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## Articles

### The Puzzle of Comment *j*

DAVID G. OWEN\*

A curious puzzle lies at the heart of section 402A of the Restatement (Second) of Torts, the fountainhead of modern products liability law.<sup>1</sup> That puzzle is this: section 402A, crafted by Dean William Prosser, generated the expansive, plaintiff-friendly doctrine of strict liability in tort for the sale of products that are defective in any of three fundamentally different ways—in manufacturing, warnings, or design. Yet a sentence in one comment to section 402A, comment *j*, can be read quite literally to mean that the provision of a warning—*any* type of warning, no matter how deficient—eliminates the manufacturer's duty of safe design.<sup>2</sup> If this be true, as a number of courts have held, then section 402A is a much weaker doctrine than generally believed. In a single sentence of a single comment to a single section of the Restatement, Dean Prosser may have stripped the doctrine of strict products liability in tort of much of its intrinsic power.

In attempting to ascertain the proper relationship between a manufacturer's duty to warn and its duty of safe design, most courts and commentators have side-stepped the problem raised by the enigmatic sentence of comment *j* simply by ignoring it. And the commentators who have studied the comment most closely, including the Reporters for the Third Restatement of Torts, have interpreted it as meaning, perversely, that a manufacturer's warnings somehow cancel out its duty of safe

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\* Carolina Distinguished Professor of Law, University of South Carolina. Thanks to John Kassel for helping me think through some aspects of this puzzle, and for research assistance to Nikki Lee and Tom Andrews. This essay draws from DAVID G. OWEN, *PRODUCTS LIABILITY LAW* § 6.2 (Thomson/West 2005). © 2005 David G. Owen and Thomson/West.

1. While there now is a Restatement (Third) of Torts on the topic of products liability, the law in most states still is largely constructed upon section 402A, the most influential section of any Restatement of the Law on any topic. At the June 8, 1993 meeting of the Consultative Group on the Products Liability Restatement, Professor Geoffrey Hazard, then Director of the ALI, reported that section 402A had been cited in judicial opinions more often than any other section of any Restatement. Central puzzles in section 402A thus carry an enduring interest for courts and lawyers trying to understand this area of the law.

2. RESTATEMENT (SECOND) OF TORTS § 402A cmt. *j* (1965).

design.<sup>3</sup> But this interpretation is wrong. In fact, the riddle of comment *j* has a key that is quite simple, discoverable from examining the history of section 402A within the context of the times, that is consistent with the way products liability law has in fact evolved over the last four decades. Until now, the curious comment *j* sentence has remained a riddle wrapped in a mystery inside an enigma.<sup>4</sup> No more.

## I. THE DISTINCTNESS OF THE PRODUCT DEFECT CONCEPTS

In products liability litigation, both the Second and Third Restatements of Torts base liability on the concept of product defect. Section 402A of the Second Restatement provides liability for selling a product in a "defective condition unreasonably dangerous"<sup>5</sup> and section 1 of the Third Restatement provides liability for selling "a defective product."<sup>6</sup> Notwithstanding this common grounding, the two Restatements treat the defect concept entirely differently.

When Dean Prosser crafted section 402A of the Second Restatement in the late 1950s and early 1960s, products liability law was in its infancy.<sup>7</sup> At that very early stage in the development of this branch of law, the defect concept was only roughly understood and conceived of quite naively as a unitary concept: products were either too dangerous (defective) or safe enough (nondefective).<sup>8</sup> As courts in the 1960s and 1970s applied the principles of section 402A to an ever-widening array of products in an ever-widening range of contexts, the disparities among the various forms of product dangers increasingly revealed themselves. Over time, courts and commentators came to understand the fundamental distinctions between three very different forms of product defect: (1) manufacturing flaws—unintended physical irregularities that occur during the production process;<sup>9</sup> (2) design inadequacies—hazards lurking in a product's engineering or scientific conception that may reasonably be avoided by a different design or formula;<sup>10</sup> and (3) insufficient warnings of danger and instructions on safe use—the absence of

3. See RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2 cmt. 1 (1998); James A. Henderson & Aaron D. Twerski, *The Politics of the Products Liability Restatement*, 26 HOFSTRA L. REV. 667, 689 (1998); Howard Latin, "Good" Warnings, Bad Products, and Cognitive Limitations, 41 UCLA L. REV. 1193, 1294-95 (1994); George Priest, *Strict Products Liability: The Original Intent*, 10 CARDOZO L. REV. 2301, 2303 (1989).

4. Comment *j* in the year 2004 may be less inscrutable than was Russia in the late 1930s, but Winston Churchill's inimitable characterization nevertheless seems apt.

5. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

6. RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 1 (1998).

7. See 1 DAVID G. OWEN ET AL., MADDEN & OWEN ON PRODUCTS LIABILITY §§ 5:2, 5:3 (3d ed. 2000) [hereinafter MADDEN & OWEN ON PRODUCTS LIABILITY].

8. See *id.* §§ 5:3, 5:5.

9. See *id.* ch. 7.

10. See *id.* ch. 8.

information needed by users to avoid product hazards.<sup>11</sup> In the decades since section 402A first roughly sketched a general doctrine of strict products liability in tort, the need to accord separate treatment to the liability issues distinctive to these very different defect contexts has become a well-accepted axiom. Today, the independent existence of each of these three separate types of defects is a fundamental premise of American products liability law.<sup>12</sup>

Section 402A of the Second Restatement provided a single rule of liability for the sale of defective products.<sup>13</sup> Because the Third Restatement in section 1 begins quite similarly in providing that a seller of a "defective product" is subject to liability for resulting harm,<sup>14</sup> it might, at first glance, appear to restate the Second Restatement's no-fault doctrine of "strict liability" that has dominated products liability doctrine since the 1960s. But section 2 of the Third Restatement radically departs from section 402A by splintering the defect notion into the three separate forms of defect—defects in manufacture,<sup>15</sup> design,<sup>16</sup> and instructions or warnings<sup>17</sup>—each with separate doctrine of its own.<sup>18</sup> By so trifurcating defectiveness, section 2 affords separate vessels for separate liability standards. Section 2(a) defines liability for manufacturing defects in terms of departure-from-intended-design, whereas sections 2(b) and (c) define liability for design and warnings defects in the foreseeable risk-utility terms of fault-based liability.<sup>19</sup> Liability in section 2 of the new

11. See *id.* ch. 9. Misrepresentation, the fourth principal basis of products liability, is not generally classified as a product "defect."

12. See generally *Ritchie v. Glidden Co.*, 242 F.3d 713 (7th Cir. 2001); *McLennan v. Am. Eurocopter Corp., Inc.*, 245 F.3d 403 (5th Cir. 2001); *Vitanza v. Upjohn Co.*, 778 A.2d 829 (Conn. 2001); *Freeman v. Hoffman-La Roche, Inc.*, 618 N.W.2d 827 (Neb. 2000). The universality of this principle is noted in the first Reporters' Note to the first comment to the first section of the Third Restatement. RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. §§ 1 cmt. a, note 1, 2 cmt. a (1998).

Early in the development of modern products liability theory, some theorists conceived of the duty to warn as a subcategory of the duty to design. For remnants of this conceptualization, see for example *Chellman v. Saab-Scania AB*, 637 A.2d 148, 150 (N.H. 1993) (stating that "[t]he duty to warn is part of the general duty to design, manufacture and sell products that are reasonably safe"); John W. Wade, *On the Effect in Products Liability of Knowledge Unavailable Prior to Marketing*, 58 N.Y.U. L. REV. 734, 740 (1983) (stating that "although 'failure to warn' is usually treated as a separate basis for finding a product actionable, 'failure to warn' cases may be properly viewed as 'defective design' cases").

13. See 1 MADDEN & OWEN ON PRODUCTS LIABILITY, *supra* note 7, § 5:3.

14. "One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect." RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 1 (1998).

15. *Id.* § 2(a).

16. *Id.* § 2(b).

17. *Id.* § 2(c).

18. See, e.g., *Hollister v. Dayton Hudson Corp.*, 201 F.3d 731, 740 (6th Cir. 2000) (stating that "design defect claims and failure to warn claims are governed by distinct analyses"); see also RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 1 cmt. a, note 1 (1998).

19. Notwithstanding the strict-sounding language of "defectiveness" in which the definitions are cast. See RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. §§ 1 cmt. a, 2 cmts. a, c, d, i, m (1998). Note that

Restatement thus is truly "strict" for manufacturing defects but is based on negligence for design and warnings defects.<sup>20</sup> The Restatement (Third) of Torts: Products Liability is premised upon the substantial independence of these three forms of defect, not only in the tripartite division of defectiveness in section 2, but also in the various provisions governing a product seller's obligations in different contexts.<sup>21</sup>

While variations among the liability standards may be the most fundamental distinction between the separate types of defects, other consequences flow from the particular type of defect alleged and proved. By way of illustration, the obviousness of a danger in most jurisdictions precludes as a matter of law a finding of warning,<sup>22</sup> but not design,<sup>23</sup> defectiveness.<sup>24</sup> Further, certain types of evidence may be proper in proving one type of defect but not another. For example, evidence of subsequent design changes may be admissible in some states to help establish a manufacturing defect, whereas such evidence may not be used to prove a defect in a warning or design case.<sup>25</sup> In addition, some jurisdictions provide for special defenses tailored to particular types of defect.<sup>26</sup>

In short, the three different types of product defectiveness generate three separate, independent sets of obligations for product sellers. But there remains a nettlesome problem, embedded in the comments to section 402A of the Restatement (Second) of Torts.

## II. THE COMMENT *j* PROBLEM

That the three types of defect beget distinct and largely independent obligations would seem to be so obvious as to be beyond dispute. From time to time, however, this fundamental principle of products liability law escapes an unwary court. Typically, the source of this confusion is an ambiguous sentence in comment *j* to section 402A of the Second Restatement which a number of decisions have construed as meaning

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the Third Restatement uses sections 1-4 to describe liability rules applicable to products generally and that it addresses liability standards applicable to special defendants, such as sellers of component parts (§ 5), prescription drugs (§ 6), food (§ 7), and used products (§ 8), in later sections.

20. See generally David G. Owen, *Restating Products Liability Law: Exploding the "Strict" Liability Myth*, 1996 U. ILL. L. REV. 743 (1996).

21. See, e.g., RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 6 (1998) (sellers of prescription drugs and medical devices subject to different standards for manufacturing defects, design defects, and warnings defects).

22. 1 MADDEN & OWEN ON PRODUCTS LIABILITY, *supra* note 7, § 10:4.

23. *Id.* § 10:3.

24. See, e.g., *Delaney v. Deere & Co.*, 999 P.2d 930, 931 (Kan. 2000).

25. See, e.g., *Cover v. Cohen*, 461 N.E.2d 864, 868 (N.Y. 1984); *Cramer v. Toledo Scale Co.*, 551 N.Y.S.2d 718, 720 (N.Y. App. Div. 1990).

26. See, e.g., N.J. STAT. ANN. § 2A:58C-3 (West 2000) (applying certain state-of-the-art defenses only to design dangers); *Cacciola v. Selco Balers, Inc.*, 127 F. Supp. 2d 175, 185-88 (E.D.N.Y. 2001) (holding that substantial modification defense may preclude liability for design, but not warning, defects).

that a manufacturer who warns of danger eludes the duty of safe design—that warnings trump design.<sup>27</sup>

Comment *j* basically sets forth, noncontroversially, a product seller's duty to warn of foreseeable hazards.<sup>28</sup> However, the comment concludes with the following "unfortunate language:"<sup>29</sup> "Where warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in [a] defective condition, nor is it unreasonably dangerous."<sup>30</sup>

This language is indeed "unfortunate" because its ambiguity permits it to be interpreted in any number of significantly different ways. For example, it may be read as meaning that *any* warning, no matter how inadequate, satisfies the *informational* obligations addressed in comment *j*; or that a warning *if adequate* satisfies those obligations; or that *any* warning, no matter how inadequate, satisfies *every* duty of whatever type owed by the seller to the user; or that an *adequate* warning will satisfy *every* duty of whatever type owed by the seller to the user. The proper interpretation of this sentence, as explained below, is really none of these, but the much more narrow proposition that the only obligation of sellers of inherently dangerous products like food, alcohol, tobacco, and drugs, in addition to supplying them free of impurities, is to warn consumers of the unavoidable, latent dangers such products foreseeably may contain. Understanding why this narrow interpretation is correct requires deconstructing comment *j*—by reading it in the context of other

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27. Parts of this and subsequent sections are drawn from David G. Owen, *Warnings Don't Trump Design: The Rise and Fall of § 402A Comment J*, PRODUCTS LIABILITY ADVISORY 1 (Nov. 2001).

28. Comment *j* to § 402A provides in full:

*j. Directions or warning.* In order to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warning, on the container, as to its use. The seller may reasonably assume that those with common allergies, as for example to eggs or strawberries, will be aware of them, and he is not required to warn against them. Where, however, the product contains an ingredient to which a substantial number of the population are allergic, and the ingredient is one whose danger is not generally known, or if known is one which the consumer would reasonably not expect to find in the product, the seller is required to give warning against it, if he has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge, of the presence of the ingredient and the danger. Likewise in the case of poisonous drugs, or those unduly dangerous for other reasons, warning as to use may be required.

But a seller is not required to warn with respect to products, or ingredients in them, which are only dangerous, or potentially so, when consumed in excessive quantity, or over a long period of time, when the danger, or potentiality of danger, is generally known and recognized. Again the dangers of alcoholic beverages are an example, as are also those of foods containing such substances as saturated fats, which may over a period of time have a deleterious effect upon the human heart.

Where warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous.

RESTATEMENT (SECOND) TORTS § 402A cmt. *j* (1965).

29. This is the characterization by the Reporters for the Third Restatement. See RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2 cmt. 1, note (1998).

30. RESTATEMENT (SECOND) OF TORTS § 402A cmt. *j* (1965).

comments (together with their “legislative history”), considering the relevant policies, and reviewing related products liability developments over time.

#### A. DECONSTRUCTING COMMENT *j*

##### 1. *Reading Comment j in Context*

In attempting to unravel the inscrutable meaning of this clause of comment *j*, one needs to read it in context by considering the comments that precede and follow it (comments *i* and *k*) and the narrow subject matter these comments in fact addressed. In examining this context, it must be remembered that the Restatement Reporter, Dean William Prosser, researched and drafted comment *j* in the late 1950s and early 1960 to accompany a narrow draft of section 402A of the Second Restatement limited to defective *food* and related products—such as drugs, alcoholic beverages, and tobacco—several years before a *general* doctrine of strict liability in tort applying to *all* products ever saw the light of day.

A close reading of comments *i*, *j*, and *k* to the Restatement (Second) of Torts section 402A, together with their “legislative history,” reveals that these comments were directed exclusively to a narrow set of issues pertinent to a limited class of products, to wit, the liability (and limits of liability) of sellers of certain types of products—food, whiskey, cigarettes, drugs, and similar products that carry unavoidable dangers. While the titles to comments *i* (“*Unreasonably dangerous*”) and *j* (“*Directions or warning*”) unfortunately suggest that they might have general application to *all* products, these comments, together with comment *k* (“*Unavoidably unsafe products*”), in fact are limited to a single narrow class of products which carry inherent hazards that cannot be designed away.

The premise of each of these three comments is that strict liability under section 402A does not apply unless a manufacturer has a reasonable way to eliminate a product’s hazards. Based on this premise, the main point of these particular comments is that the only duties of manufacturers of food, whiskey, cigarettes, drugs, and similar products containing generic risks is to warn consumers of the hidden dangers. The comments thus explain that this limited class of products, accompanied by proper warnings, are not in a “defective condition unreasonably dangerous” with respect to the unavoidable dangers inherent in products of this type.

##### a. *Comment i*

Comment *i* explains why the ALI added the phrase “defective condition” to modify the “(unreasonably) dangerous” phrase used in an earlier, preliminary draft of section 402A. The “defective condition” language was added (at the urging of the ALI Council) to make clear that the new “strict” liability in tort would *not* give rise to design liability



for selling products like food, whiskey, and cigarettes that contain inherent dangers that cannot be eliminated.<sup>31</sup> Comment *i* thus explains that, while the strict liability principle of section 402A properly applies to injuries caused by contaminated tobacco, food, and drink, it does not apply to injuries from the inherent dangers consumers widely know such products to contain.<sup>32</sup>

b. *Comment j*

Comment *j*, first attached to the 1961 draft of section 402A that applied only to food and similar products, also discusses and applies only to dangerous foods, alcoholic beverages, and drugs, products that by their nature cannot be rendered safe except by warnings. This comment makes three points. First, continuing the reasoning of comment *i*, comment *j* points out that sellers of food, tobacco, alcohol, drugs, and similar products widely known to be inherently dangerous are *not* generally subject to strict liability for such dangers because consumers understand that products of these types necessarily include such risks. Next, comment *j* notes that sellers of such products *do* have a duty to warn consumers of any latent risks of which consumers generally are unaware. Finally, it recognizes that because there simply is no way *other than by warning* that sellers of *such* products can minimize the inherent risks, that the only reasonable duty of sellers of this narrow class of product is to warn consumers of any hidden dangers.<sup>33</sup>

The premise here is that sellers of *generically dangerous products* may trust that users, properly informed of any hidden dangers, will read and heed any (adequate) warnings and take responsibility for such inherent risks.<sup>34</sup> Thus, properly interpreted, comment *j*'s concluding sentence actually means:

Where [adequate] warning [of any hidden dangers] is given, the seller [of inherently dangerous products like food, drugs, alcoholic beverages, and cigarettes] may reasonably assume that [the warning] will be read and heeded [because there is nothing else the seller can do to avoid the danger]; and [such] a product bearing such a warning, which is safe for use if it is followed, is not in [a] defective condition, nor is it unreasonably dangerous.

Thus, comment *j* actually addresses only the narrow issue of a seller's duties with respect to food, tobacco, drugs, alcoholic beverages, and similar products containing inherent and unavoidable risks that

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31. See 38 A.L.I. PROC. 87-89 (1961).

32. "Many products cannot possibly be made entirely safe . . . ." RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1965).

33. In addition, of course, to any seller's duties not to sell a product in a contaminated or physically flawed condition and not to misrepresent a product's safety.

34. Indeed, sellers of such products *must* trust in the good sense of users, for there is nothing else to be done.

cannot be designed away.<sup>35</sup> Conversely, comment *j* does *not* address how warnings may affect the duty of safe design for *other* types of products whose dangers *can* reasonably be designed away.<sup>36</sup>

c. *Comment k*

Reiterating the overarching theme of all three comments—that a limited class of inherently and unavoidably dangerous products should be exempt from any design obligations under the strict liability rule of section 402A—comment *k* explains how, in particular, the principles of comments *i* and *j* apply to prescription drugs. In the context of this special type of unavoidably dangerous product, comment *k* reiterates the dual points that a seller does have a duty to provide proper warnings but that it is not otherwise liable for any inherent risks that cannot be designed away.<sup>37</sup>

In sum, a careful reading of comments *i*, *j*, and *k* makes clear that they address *only* the narrow, unavoidable danger issue with respect to inherently dangerous products like foods, cigarettes, whiskey, and drugs.<sup>38</sup> Everything in the comments points to their limited applicability, and nothing<sup>39</sup> suggests that they were intended to limit a seller's duty to design its products safely if there is a reasonable way to do so.<sup>40</sup>

35. This interpretation of comment *j* is further supported by its direction that any required warnings be placed on the product's "container," surely the best place to warn of inherent dangers in food, drugs, whiskey, and cigarettes, but nonsensical when applied to the vast array of durable products that come without containers—tools, clothing, power mowers, automobiles, vacuum cleaners, and punch presses—for which the law requires that warnings against significant hidden dangers be located in the most appropriate place.

36. Dangers that *can* reasonably be designed out of products are by definition neither "inherent" nor "unavoidable."

37. Comment *k* provides in pertinent part:

There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. . . . The seller of such products[, particularly drugs], again with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences [from] a known but apparently reasonable risk.

RESTATEMENT (SECOND) OF TORTS § 402A cmt. k (1965).

38. The *only* examples in comments *i-k* are, in order: sugar (diabetes), castor oil (used by Mussolini for torture), whiskey (drunkenness), tobacco (cancer), butter (cholesterol and heart attacks), eggs (allergies), strawberries (allergies), alcohol (drunkenness), fatty foods (heart attacks), Pasteur rabies vaccine (allergic reactions), and other drugs and vaccines (side effects).

RESTATEMENT (SECOND) OF TORTS § 402A cmts. i-k (1965).

39. Except possibly for the unfortunate generality of their titles, left over from early tentative drafts of § 402A that applied only to food, and then food, drugs, and bodily use products. Once *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897 (Cal. 1963), was decided, Dean Prosser promptly expanded the black letter of § 402A from food and products for "intimate bodily use" to *all* products. In his haste to revise the draft in this manner, as discussed below, Prosser neglected to adapt most of the comments to their now much broader scope, leaving most of them in the form in which they had originally been drafted with a much more limited type of product in mind. Had he had more time, no doubt he would have added a major heading over comments *i*, *j*, and *k*, entitled "UNAVOIDABLY UNSAFE PRODUCTS," and then changed the title of comment *k* to "*Prescription drugs*."

40. In short, the comments simply recognize that you can't put a safety device on a stick of butter.

## 2. Comment *j*'s "Legislative History"

The above contextual interpretation of comment *j* is confirmed by an examination of the evolution of section 402A drafts from 1961 through 1964, together with the contemporaneous scholarship of Dean Prosser and certain key Restatement Advisers. Section 402A was presented to the full American Law Institute three times, beginning with Tentative Draft No. 6 in 1961.<sup>41</sup> In this draft, section 402A imposed strict liability in tort upon sellers of "food in a defective condition unreasonably dangerous to consumers." In three small paragraphs, a single comment *f* (entitled "Unreasonably dangerous") contained the entire discussion of the issues that in the final published version eventually spanned three comments—*i*, *j*, and *k*. Although the section 402A black letter spoke only in terms of "food," comment *c* defined that word to embrace "all products intended for internal human consumption," including beverages, candy, chewing gum, chewing tobacco, snuff, unground coffee beans, and drugs.<sup>42</sup>

The next year, 1962, in order to embrace these non-food items more comfortably, the black letter of section 402A was expanded in Tentative Draft No. 7 to cover, in addition to food, "other products for intimate bodily use."<sup>43</sup> In this draft, the discussions in comment *f* of the previous draft (Tentative Draft No. 6) were expanded upon and divided into comments *i*, *j*, and *k*. In 1964, one year after Justice Traynor's landmark ruling in *Greenman v. Yuba Power Products, Inc.*,<sup>44</sup> the black letter of section 402A was expanded again (in Tentative Draft No. 10)<sup>45</sup> to broaden the applicability of strict liability in tort to the sale of *all* products in a "defective condition unreasonably dangerous to the user or consumer." In this final draft, which Dean Prosser hurriedly rewrote to accommodate *Greenman*,<sup>46</sup> comments *i*, *j*, and *k* (all three of which sprang from the comment *f* that had been written to accompany the "food" black-letter draft of 1961<sup>47</sup>) remained essentially unchanged.<sup>48</sup>

41. Two earlier drafts of § 402A, applying the strict liability principle to food sold in a "dangerous" condition, were presented respectively to the Advisers and the Council. See Preliminary Draft No. 6 (Jan. 3, 1958) (submitted to the Advisory Committee), and Council Draft No. 8 (Nov. 1, 1960) (submitted to the Council). Neither draft contains a comment or other discussion addressing the issues treated in the final comments *i*, *j*, and *k*.

42. RESTATEMENT (SECOND) OF TORTS § 402A cmt. c (Tentative Draft No. 6, 1961).

43. RESTATEMENT (SECOND) OF TORTS § 402A (Tentative Draft No. 7, 1962).

44. 377 P.2d 897 (Cal. 1963).

45. The American Law Institute approved Draft No. 10 in 1964 and promulgated § 402A in final, published form the next year. See RESTATEMENT (SECOND) OF TORTS § 402A (1965).

46. Once *Greenman* was rendered in 1963, Dean Prosser had to scramble to convert § 402A from its prior, narrow coverage to *all* products. Apart from his many other duties as Torts Restatement Reporter, dean, and professor, he had to prepare Tentative Draft No. 10 for circulation, first, to the Advisers, then to the Council, and finally to the whole ALI membership in time for the May 1964 annual meeting.

47. And which he had fleshed out in the 1962 draft to accommodate other products for intimate bodily use. See *supra* notes 42–43 and accompanying text.

The contemporaneous scholarship of Dean Prosser and key ALI Advisers also suggests that comment *j* was intended only to address the narrow unavoidable danger issue in foods, drugs, cigarettes, whiskey, and the like. In his only three products liability articles published after section 402A was promulgated in 1965,<sup>49</sup> and in the next edition of his hornbook,<sup>50</sup> Dean Prosser examined the unavoidable danger issue, using the same examples and reasoning as he had used in comments *i*, *j*, and *k*. The only salient difference in his treatment of these issues in his scholarship,<sup>51</sup> distinguished from the comments, is that he reverted in his scholarship to lumping the inherent danger issues all together, under a single "unavoidable danger" umbrella, as he originally had done in comment *f* of Tentative Draft No. 6.<sup>52</sup> This suggests that Dean Prosser, the Reporter for section 402A, intended the narrow, contextual interpretation of comment *j* discussed above.

Although it appears that Dean Prosser never directly addressed the availability of design defect claims under section 402A for failing to adopt a reasonable alternative design, his writings indicate that he

48. Apart from the addition of a butter example to comment *i*, and corrections of technical errors throughout, the comments in Tentative Drafts 7 and 10 are substantially the same.

There is only sparse discussion of the comment *j* issue in the Restatement debates, but nothing there suggests that Dean Prosser or anyone else contemplated that limiting a seller's responsibility to a duty to warn extended beyond the inherently dangerous food-type products then being considered; certainly there is no intimation that this limited duty might apply to manufacturers of durable goods whose dangers may reasonably be designed away. In discussing a manufacturer's duty to warn, Dean Prosser noted: "It is not correct to say that [the manufacturer] can always avoid liability by giving reasonable notice." 38 A.L.I. PROC. 68 (1961). While the meaning of this sentence is somewhat unclear in its context, Dean Prosser's general remarks do make clear that the last sentence of then comment *f* (now comment *j*) only addressed the kinds of inherent, unavoidable risks dealt with in the food and drug examples covered by then comment *f* (now comments *i*, *j*, and *k*).

49. William L. Prosser, *Products Liability in Perspective*, 5 GONZ. L. REV. 157, 164-74 (1970) [hereinafter Prosser, *Products Liability in Perspective*]; William L. Prosser, *Strict Liability to the Consumer in California*, 18 HASTINGS L.J. 9-58 (1966) [hereinafter Prosser, *Strict Liability to the Consumer*]; William L. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 802-48 (1966) [hereinafter Prosser, *The Fall of the Citadel*].

50. WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 99, at 660 (4th ed. 1971) [hereinafter PROSSER ON TORTS] (beginning: "The second, and more important, question concerns [whether 402A should apply to] products that in the present state of human skill and knowledge are unavoidably dangerous, and cannot be made safe.").

51. In his last, and least formal article, Dean Prosser explained in fairness terms the rationale for imposing only a duty to warn (and keep pure) on sellers of food, drugs, and other useful products containing dangers that cannot be avoided:

You cannot impose strict liability upon a man who sells what appears to be a perfectly reputable product and is actually extremely beneficial to the human race; you cannot make him strictly liable because once in a while something goes wrong with it in a way which he cannot prevent.

Prosser, *Products Liability in Perspective*, *supra* note 49, at 166.

52. In all three articles and the hornbook, Prosser states that the question whether § 402A should apply to unavoidably dangerous products is one of the two or three most important issues on the proper reach of strict liability, and he organizes this discussion (that the final draft of § 402A had splintered into comments *i*, *j*, and *k*) under the general heading, Type of Product (in the articles) and "Unsafe Products" (in the hornbook).

believed that section 402A properly applies to such cases without regard to whether the danger was obvious or a warning had been given.<sup>53</sup> This conclusion is confirmed by his observation that the applicability of section 402A to design defect cases was, with respect to manufacturers, essentially coincident with negligence law<sup>54</sup> which, even prior to section 402A, allowed recovery against manufacturers for negligently omitting feasible safety devices.<sup>55</sup>

The scholarship of at least four key ALI Advisers, Professor James, Deans Keeton and Wade, and Justice Traynor,<sup>56</sup> confirms that the duty of safe design is largely independent of the duty to warn. A decade prior to section 402A, Professor James wrote, "the risk that warning will not be heeded, and the danger likely to ensue if it is not, may be so great as to call for some safety device or even for abandonment of the process or the

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53. In the only edition of his hornbook after § 402A was published in 1965, Dean Prosser addressed the meaning of § 402A's key phrase, "defective condition unreasonably dangerous," noting that it applies to design defects as well as manufacturing defects. PROSSER ON TORTS, *supra* note 50, § 99, at 659. One of the cases Prosser cites for this proposition is a safety device case, *Pike v. Frank G. Hough Co.*, 467 P.2d 229 (Cal. 1970). *Pike* explains why strict liability applies to design defects as well as warnings defects. *Id.* at 235-37. It also explicitly repudiates the "patent danger rule." *Id.* at 234 ("the obviousness of peril is relevant to the manufacturer's defenses, not to the issue of duty."). With the repudiation of this rule, the defendant's argument that the manufacturer had no duty to design away dangers which were known to the user became unfounded. *Id.* at 234-35. The court quotes long passages from HARPER & JAMES ON TORTS and Noel's *Manufacturer's Negligence of Design or Directions for Use of a Product*. *Id.* at 236. The latter of these treatises concluded, "Under the modern rule, even though the absence of a particular safety precaution is obvious, there ordinarily would be a question for the jury as to whether or not a failure to install the device creates an unreasonable risk." David Noel, *Manufacturer's Negligence of Design or Directions for Use of a Product*, 71 YALE L.J. 816, 838 (1962). *Pike* also relies substantially on *Garcia v. Hallett*, 82 Cal. Rptr. 420 (Cal. Ct. App. 1970). In *Garcia*, the court permitted a design defect claim under strict liability in tort for injuries that the defendant should have prevented by equipping the machine with an electrical interlock (a "micro switch") that would have automatically cut off the electricity to the machine. *Id.* at 422-23. Prosser in this manner endorsed the applicability of § 402A to design dangers which manufacturers reasonably can avoid.

54. "Since proper design is a matter of reasonable fitness, the strict liability [under § 402A] adds little or nothing to the negligence on the part of the manufacturer . . ." PROSSER ON TORTS, *supra* note 50, § 99, at 659 n.72.

55. See *id.* § 96, at 645 ("There is no doubt whatever that the manufacturer is under a duty to use reasonable care to design a product that is reasonably safe for its intended use, and for other uses which are foreseeably probable."). Among the cases cited by Prosser in this excerpt is *McCormack v. Hanks Craft Co.*, 154 N.W.2d 488 (Minn. 1967), which involved a hot water vaporizer that a young child tipped over by mistake, causing the extremely hot water to scald the child when the unattached lid fell off. *Id.* at 493. Because the plastic top easily could have been threaded to permit it to be screwed onto the top of the hot-water reservoir jar, which would have prevented the injury, the court allowed design claims against the manufacturer in both negligence and strict liability in tort under § 402A. *Id.* at 497-502.

56. Professor Fleming James (HARPER & JAMES ON TORTS) of Yale, Dean W. Page Keeton of the University of Texas, and Dean John W. Wade of Vanderbilt University were prominent tort law scholars of the day. Justice (later Chief Justice) Roger Traynor authored the principal judicial authority for § 402A in *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897, 901 (Cal. 1963), theoretically grounded in his concurring opinion in *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 439 (Cal. 1944).

product if its utility is outweighed by the danger. Surely an automobile manufacturer would be negligent in marketing cars without brakes, even if that fact were known to all the world . . .”<sup>57</sup> Dean Keeton’s scholarship reveals that products liability scholars at the time were concerned principally with whether strict liability should be applied to manufacturing defects and, much more controversially, to inherently dangerous products such as food, drugs, cosmetics, whiskey, and tobacco.<sup>58</sup> As for more usual kinds of products, Dean Keeton rejected the view that a manufacturer’s duty of safe design somehow vanishes if the danger is obvious or the user otherwise (as by a warning) is aware of the danger.<sup>59</sup> Dean Wade was more explicit, explaining that “a warning will not always be sufficient.”<sup>60</sup> Chief Justice Traynor, an ALI Adviser for section 402A as well as the author of *Greenman*, addressed this issue head-on in an article published the year section 402A was published.<sup>61</sup> Observing that the last sentence of comment *j* was directed at inherently dangerous products such as poison and cigarettes, products with dangers that cannot be designed away, he specifically noted that comment *j* in no way insulates manufacturers who provide warnings from liability for the other two types of product defects—manufacturing defects and defects in design. That is, manufacturers cannot use warnings to shift responsibility to consumers for these other, independent types of defects.<sup>62</sup>

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57. Fleming James Jr., *Products Liability*, 34 TEX. L. REV. 44, 58 (1955).

58. See Page Keeton, *Products Liability—Liability Without Fault and the Requirement of a Defect*, 41 TEX. L. REV. 855, 861–73 (1963); cf. John W. Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.J. 5, 22 (1965). See generally George L. Priest, *Strict Products Liability: The Original Intent*, 10 CARDOZO L. REV. 2301, 2303 (1989).

59. “[T]he proposition that the user’s knowledge of a particular hazard involved in the use of a product should necessarily preclude recovery by him if victimized by that hazard is rejected . . .” Page Keeton, *Products Liability—Inadequacy of Information*, 48 TEX. L. REV. 398, 401 (1970). Dean Keeton also rejects an economic argument “that a consumer and others who are injured through the use of a product do not have any right to be secure from harm from dangerous products apart from a right to be informed or apart from safety legislation.” *Id.* at 401.

60. John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 842 (1973). Dean Wade provided some examples: “An electrical appliance with uninsulated wires would not be made duly safe by attaching a warning to look out for the danger of electric shock.” and “A rotary lawn mower, for example, which had no housing to protect a user from the whirling blade would not be treated as duly safe, despite the obvious character of the danger.” *Id.* at 842–43. He also notes the similarity of issues in cases where a danger is warned about and where it is obvious. *Id.*

61. See Roger J. Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 367–73 (1965) (examining the cases on food, drugs, tobacco, and similar products). “Some dangers are generic to the goods, so that people regard the goods as fit for ordinary use even with such qualities. The manufacturer would not be liable, under the *Restatement* test, for harm caused by generic dangers.” *Id.* at 370 (referring to comment *i*); see also *id.* at 367 (§ 402A “would impose no strict liability for what are classified as ‘unavoidably unsafe products’”) (citing comment *k*); *id.* at 372 (warnings “cannot be used, however, to mask a disclaimer of responsibility that would shift the risk to the consumer”) (referring to comment *j*).

62. See *id.* at 372:

What is the effect of warning or notice? The *Restatement* provides: “Where warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning which is safe for use if the warning is heeded, is not in a defective

It is evident that the comments to section 402A were not provided as a complete products liability "code" but in fact addressed only certain limited aspects of the new doctrine of strict products liability in tort. The comments do not directly address, outside of the narrow context of unavoidably dangerous products, the broader issue of the relationship between the general duties of warnings and safe design. As seen above, however, contemporaneous scholarship of Dean Prosser and his key ALI Advisers quite firmly suggests that comments *i*, *j*, and *k* were intended to address only the narrow issue of the limited manner in which the new strict liability section applied to unavoidably dangerous products whose inherent risks cannot be designed away. Their scholarship suggests, and the comments to section 402A imply, that the new strict liability doctrine in fact requires manufacturers to physically remove substantial dangers—even if they are warned about, obvious, or generally known—if there is a reasonable way to do so.

## B. POLICY

It makes good sense to interpret comment *j* narrowly, as limiting the duties of sellers of inherently dangerous products like drugs, cigarettes, and alcoholic beverages to providing products that are uncontaminated and possess adequate warnings of hidden dangers. Because there is no way (other than by providing warnings) that manufacturers of such products can minimize the inherent dangers of such products without also destroying their utility, there is no good reason in corrective justice or economics to force manufacturers to insure consumers against risks of harm they have chosen to accept by using products with inherent risks they fully understand. But if a product contains substantial risks that *can* reasonably be designed away, then a manufacturer that does not do so should be faulted, in both fairness and economics, for failing to respect the rights of consumers to reasonable product safety. These fundamental precepts, explored elsewhere in greater depth,<sup>63</sup> support the logic and fairness of keeping the manufacturer's duty of safe design largely independent of the duty to warn. To hold that warnings immunize manufacturers from the duty of safe design (or the duty of safe manufacture) would unreasonably and regressively subordinate the interests of consumers to the interests of manufacturers.<sup>64</sup>

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condition. . . ." [Citing cmt. *j*.] Example: poison. A warning or notice cannot be used, however, to mask a disclaimer of responsibility that would shift the risk to the consumer. Thus, a notice by a manufacturer of soft drinks listing the possible foreign substances that might be contained in a bottle of its beverage, or a notice by an automobile manufacturer listing possible difficulties that might be encountered by the user of the car, would not preclude liability.

63. See David G. Owen, *The Moral Foundations of Products Liability Law: Toward First Principles*, 68 NOTRE DAME L. REV. 427, 460 (1993).

64. See, e.g., Howard Latin, "Good" Warnings, Bad Products, and Cognitive Limitations, 41 UCLA L. REV. 1193, 1294-95 (1994). Latin explains the problems of interpreting comment *j* to mean

A rule that fulfilling *one* of several independent tort law duties fulfills them *all* is quite preposterous. Surely a driver has a duty of reasonable care to give warning, by tooting the horn, to all pedestrians endangered by the car's approach, even if they are at fault for being in the roadway. But a driver also has duties to maintain a proper lookout, to apply the brakes when appropriate, to operate the car soberly and with reasonable skill, to obey traffic signals, and not to speed. It would be absurd to interpret an ambiguous traffic rule in a manner that would relieve a driver of all responsibilities to pedestrians so long as the driver, though violating all the other duties, tooted the horn. Applying this principle to the products liability situation here at issue, it makes no sense to relieve a manufacturer of all its other duties—notably its duties to design and manufacture its products safely—simply because it places a warning on its products. Such a rule would senselessly allow a manufacturer of household fans to substitute a warning on the base of the fan for the fan's protective cage; it would allow a manufacturer of power mowers to attach a warning on the engine and then remove the protective housing around the blade; and it would permit a manufacturer of industrial machinery a simple but completely unsatisfactory means to avoid its basic duty to equip its machines with simple guards and electric interlocks when such safety devices are reasonably demanded in the circumstances to avoid substantial harm.

### C. THE EVOLVING PRODUCTS LIABILITY JURISPRUDENCE

Comment *j*, as previously explained, addresses the narrow issue of how section 402A allocates responsibility for harm caused by unavoidable dangers inherent in a narrow class of products. But even in the unlikely event that comment *j* was intended to make warnings a

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that warnings trump a manufacturer's duty of safe design:

[T]he comment *j* presumption is unrealistic from a behavioral perspective, inefficient from an accident-prevention perspective, and inequitable from a normative perspective. . . . Good product warnings may be useful, indeed necessary, in many accident-prevention settings but their value is inherently limited and they consequently should not be treated as legally acceptable alternatives to safer product designs and marketing strategies.

*Id.*; see also James A. Henderson Jr. & Aaron D. Twerski, *A Proposed Revision of Section 402A of the Restatement (Second) of Torts*, 77 CORNELL L. REV. 1512, 1538 (1992) ("Product warnings cannot bear the full burden of ensuring that products will be used safely. If a sensible design alternative can significantly reduce risk, the law will demand that the manufacturer design out the risk rather than merely warn against it."); 1 MADDEN & OWEN ON PRODUCTS LIABILITY, *supra* note 7, §§ 10:3, 10:5.

The issue was debated by Professors Jerry J. Phillips and Richard C. Ausness. See Jerry J. Phillips, *Products Liability: Beyond Warnings*, 26 N. KY. L. REV. 595, 602 (1999) ("It seems too late . . . to return to an unbridled doctrine of laissez faire or caveat emptor, in the modern-day of complex products, advertising blandishments, and clearly foreseeable human frailty."); see also Kenneth Ian Weissman, *A "Comment J" Parry to Howard Latin's "Good" Warnings, Bad Products, and Cognitive Limitations*, 70 ST. JOHN'S L. REV. 629 (1996); cf. Richard C. Ausness, *When Warnings Alone Won't Do: A Reply to Professor Phillips*, 26 N. KY. L. REV. 627, 646 (1999) (Professor Phillips "rightly criticizes" comment *j*, but the Third Restatement's approach in comment *l* to § 2 goes too far the other way).



*general* shield against the duty of safe design, such an approach contrasts starkly with developments in products liability law over the past half century. When Dean Prosser researched and initially drafted comment *j* in 1959 and 1960, products liability law was still dominated by many strictures from the early 1900s: liability was rarely imposed for a manufacturer's conscious design choices;<sup>65</sup> the patent danger doctrine still reigned supreme in limiting a manufacturer's design responsibility to only latent dangers;<sup>66</sup> consumer expectations were the only gauge of strict products liability (in warranty and, later, under section 402A);<sup>67</sup> consumer carelessness in any degree, even in the face of an egregiously dangerous product design, served to bar recovery altogether;<sup>68</sup> and the intended use doctrine barred liability for most forms of consumer misuse ("abnormal use"), including the failure to follow a seller's instructions, on the ground that it superseded the manufacturer's responsibility.<sup>69</sup> Yet, soon after section 402A was published (together with its comments, including comment *j*) in 1965, the law took several sharp turns the other way. By the 1970s, courts began with a gusto to apply judicial oversight to manufacturer design choices;<sup>70</sup> the patent danger doctrine began a precipitous decline into virtual extinction;<sup>71</sup> the risk-utility standard began to swallow up the consumer expectation test for evaluating the safety of a product's design;<sup>72</sup> the total bar for user carelessness was rapidly giving way to damages apportionment based on comparative fault;<sup>73</sup> and the scope of a manufacturer's responsibility for product safety was widening broadly from intended uses to all foreseeable uses.<sup>74</sup>

In the twenty-first century, the most sensible way to interpret the ambiguous last sentence of comment *j* is according to its original intent—that it applies only to the narrow category of inherently dangerous products with unavoidable dangers like food, drugs, alcoholic beverages, and tobacco. If for some reason a court feels impelled to interpret this sentence more broadly, as applicable to *all* types of products, then the sentence should be interpreted as meaning nothing more than that a manufacturer may fulfill its informational obligations to consumers by providing adequate warnings and instructions.<sup>75</sup> According greater

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65. See 1 MADDEN & OWEN ON PRODUCTS LIABILITY, *supra* note 7, § 8:1.

66. See 1 *id.* § 10:2.

67. See 1 *id.* §§ 5:6, 8:3.

68. See 2 *id.* § 14:2.

69. See 2 *id.* § 14:4; PROSSER ON TORTS, *supra* note 50, § 102, at 669; William Prosser, *supra* note 49, at 824-26 (1966).

70. See 1 MADDEN & OWEN ON PRODUCTS LIABILITY, *supra* note 7, § 8:1.

71. See 1 *id.* § 10:1.

72. See 1 *id.* §§ 5:6, 5:7, 8:2-8.

73. See 2 *id.* § 15:1-9.

74. See 2 *id.* § 14:4.

75. See, e.g., *Moulton v. Rival Co.*, 116 F.3d 22, 28 (1st Cir. 1997) (restricting comment *j* to cases involving only duty to warn); see also *Uptain v. Huntington Lab, Inc.*, 723 P.2d 1322, 1331, 1332-33

import to comment *j*, as meaning that a warning cancels the fundamental duty of manufacturers of ordinary products to take reasonable steps to design away serious hazards, would elevate consumer responsibility for accidents to the lofty, archaic position it has not occupied for almost half a century,<sup>76</sup> and it would revive a host of discredited doctrines that long ago were properly put to rest.<sup>77</sup>

#### D. PRESENT STATUS OF COMMENT *j*

With the exception of a handful of misguided decisions that have misinterpreted comment *j* as negating the general duty of safe design,<sup>78</sup> the vast majority of courts, some rejecting comment *j* explicitly on this point,<sup>79</sup> hold that the separate forms of defect give rise to separate

(Colo. 1986) (Quinn, C.J., dissenting); *Evridge v. Am. Honda Motor Co.*, 685 S.W.2d 632, 636 (Tenn. 1985); cf. *Delaney v. Deere & Co.*, 999 P.2d 930, 941-42 (Kan. 2000). Ironically, in *Delaney*, the defendant proposed this interpretation but it was rejected by the court.

76. Imposing absolute responsibility on consumers ignores real-world limitations on human cognition:

The Comment *j* presumption embodies the behavioral assumption that "reasonable" users can be expected to receive, correctly interpret, and obey every comprehensible warning accompanying every product they use or encounter. Yet, people are exposed each day to innumerable risks created by appliances that may malfunction or be mishandled; by potentially toxic pollutants, food additives, and other chemical substances; by cosmetics, drugs, and cleansing agents that may be improperly applied and are inherently dangerous for some sensitive individuals; by machine tools, presses, and other industrial or occupational equipment; and by hazardous transportation and recreation devices. Indeed, almost all products present substantial risks if improperly manufactured, designed, or used. People would have to read, understand, remember, and follow innumerable product warnings to protect themselves from all product-related risks they may confront.

Latin, *supra* note 64, at 1206 (citations omitted) (cognitive theory shows that warnings should only be used to supplement reasonable designs, not to substitute therefore); see also RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2 cmt. 1, note (1998); Aaron D. Twerski et al., *The Use and Abuse of Warnings in Products Liability: Design Defect Comes of Age*, 61 CORNELL L. REV. 495, 506 (1976).

77. Defense lawyers, who are quite happy to try to revive the old defendant-protective rules, argue that comment *j* should be interpreted to mean that a manufacturer which provides a warning should be relieved of its duty of safe design. See, e.g., Stephen G. Morrison, *Products Liability: Warning vs. Design in Products Litigation: Third Time's Not Always a Charm*, 10 KAN. J.L. & PUB. POL'Y 86, 86 (2000); V. Schwartz, *See No Evil, Hear No Evil: When Clear and Adequate Warnings Do Not Prevent the Imposition of Product Liability*, 68 U. CIN. L. REV. 47, 59-60 (1999). Yet even Mr. Schwartz is reluctant to endorse this extreme position. *Id.* (recognizing the Third Restatement's "legitimate concern" that people may not in fact read and heed all warnings, and noting the possibility that "courts could 'over-read' Comment *j* . . . to mean that a manufacturer who warns about a risk is not liable"—giving example of power lawnmower, which carries warning to stay away from unguarded blade, as situation where warning would not protect manufacturer from duty to add guard).

78. Interpreting comment *j* to mean that a warning eliminates the manufacturer's duty to provide a safe design. See, e.g., *Ferguson v. F.R. Winkler GMBH & Co.*, 79 F.3d 1221, 1226 (D.C. Cir. 1996); *Simpson v. Standard Container Co.*, 527 A.2d 1337, 1341-42 (Md. Ct. Spec. App. 1987); *Freas v. Prater Constr. Corp.*, 573 N.E.2d 27, 31-32 (Ohio 1991); *Curcio v. Caterpillar, Inc.*, 543 S.E.2d 264, 269 (S.C. Ct. App. 2001), *rev'd on other grounds*, 585 S.E.2d 272 (S.C. 2003); cf. *Dugan v. Sears, Roebuck & Co.*, 447 N.E.2d 1055 (Ill. App. Ct. 1983) (holding that whether user's ignoring warning was sole proximate cause is a jury issue, based largely upon its foreseeability).

79. Until recently, most courts basically ignored the offending language of comment *j*, presumably because they could not believe that it says anything serious about the relationship between warnings and design for most products. The Third Restatement's explicit rejection of this aspect of the

obligations that may independently support a products liability claim.<sup>80</sup> Thus, except in certain limited contexts,<sup>81</sup> it is abundantly clear that a manufacturer is subject to liability for a product's *manufacturing* defects, no matter how clear the product's warnings or how perfect its design;<sup>82</sup> for *warning* defects, no matter how perfect the product's manufacture or how impeccable its design;<sup>83</sup> and for *design* defects, no matter the precision of its manufacture or the abundance of its warnings.<sup>84</sup> This

Second Restatement's comment j, however, focused courts and lawyers specifically on this point and served, ironically, to revivify the argument that warnings trump design.

Recent cases explicitly rejecting the warnings-trump-design interpretation of comment j include *Rogers v. Ingersoll-Rand Co.*, 144 F.3d 841, 844 (D.C. Cir. 1998); *Delaney*, 999 P.2d at 942 (Kan. 2000) ("just because there is a warning on a piece of equipment, the warning does not prevent the equipment from being dangerous"); *Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328, 335-37 (Tex. 1998); see also *Leaf v. Goodyear Tire & Rubber Co.*, 590 N.W.2d 525, 529 (Iowa 1999) (dictum critical of cmt. j).

80. Even critics of the Third Restatement's rejection of the warnings-trump-design approach acknowledge that the Third Restatement position is widely embraced by the courts. See, e.g., Ausness, *supra* note 64, at 638 (1999).

81. As with pharmaceutical drugs containing unavoidable dangers, where warnings normally are the only way to eliminate the risk. See RESTATEMENT (SECOND) OF TORTS § 402A cmt. k (1965).

82. See, e.g., *Chapman v. Maytag Corp.*, 297 F.3d 682, 689 (7th Cir. 2002) ("[A]dequate warnings will not render a product with a manufacturing defect non-defective, regardless of whether compliance with the warning would have rendered the product safe."); *Glover v. BIC Corp.*, 987 F.2d 1410, 1416 (9th Cir. 1993) ("[A] product with a manufacturing defect . . . cannot be made 'non-defective' simply by placing a warning on the product."); *Falada v. Trinity Indus. Inc.*, 642 N.W.2d 247, 251 (Iowa 2002) ("[D]efective design and defective workmanship are separate concepts.").

83. See, e.g., *Hiner v. Deer & Co., Inc.*, 340 F.3d 1190, 1193 (10th Cir. 2003) ("A product, though perfectly designed and manufactured, may be defective if not accompanied by adequate warnings of its dangerous characteristics." (quoting *Meyerhoff v. Michelin Tire Corp.*, 70 F.3d 1175, 1181 (10th Cir. 1995))); *Stahl v. Novartis Pharms. Corp.*, 283 F.3d 254, 261 (5th Cir. 2002) ("Even if a product is not defectively designed or constructed, a manufacturer 'may still have a duty to warn consumers about any characteristic of the product that unreasonably may cause damage.'" (quoting *Greneir v. Med. Eng'g Corp.*, 243 F.3d 200, 205 (5th Cir. 2001))); *Lewis v. Sea Ray Boats, Inc.*, 65 P.3d 245, 245 (Nev. 2003) ("Strict liability may be imposed even though the product is faultlessly made if it was unreasonably dangerous to place the product in the hands of the user without suitable and adequate warning concerning safe and proper use." (quoting *Outboard Marine Cop. v. Schupbach*, 561 P.2d 450, 455 (Nev. 1977))); *Hanus v. Texas Utils. Co.*, 71 S.W.3d 874, 879 (Tex. App. 2002) ("Texas law clearly provides that a lack of adequate warnings or instructions can render an otherwise adequate product unreasonably dangerous."); *Wilkinson v. Duff*, 575 S.E.2d 335 (W. Va. 2002) ("A failure to warn cause of action 'covers situations when a product may be safe as designed and manufactured, but which becomes defective because of the failure to warn of dangers which may be present when the product is used in a particular manner.'" (quoting *Ilosky v. Michelin Tire Corp.*, 307 S.E.2d 603, 609 (W. Va. 1983))).

84. See, e.g., *White v. ABCO Eng'g Corp.*, 221 F.3d 293, 305-06 (2d Cir. 2000) (holding that notwithstanding clearly adequate warnings, conveyor manufacturer was subject to liability for failing to provide side guarding); *Rogers v. Ingersoll-Rand Co.*, 144 F.3d 841, 844 (D.C. Cir. 1998); *Crow v. Manitex, Inc.*, 550 N.W.2d 175 (Iowa Ct. App. 1996) (holding manufacturer of improperly used crane, contrary to adequate warnings and instructions that would have prevented accident if heeded, subject to liability for failing to design crane so as to prevent the accident); *Delaney v. Deere & Co.*, 999 P.2d 930, 942 (Kan. 2000) ("[J]ust because there is a warning on a piece of equipment does not prevent the equipment from being dangerous."); *Uloth v. City Tank Corp.*, 384 N.E.2d 118 (Mass. 1978) ("If a slight change in design would prevent serious, perhaps fatal, injury, the designer may not avoid liability by simply warning of the possible injury. We think that in such a case the burden to prevent needless

latter point is the most significant, because of the lingering, perverse effects of comment *j*'s long tentacles in a number of jurisdictions.<sup>85</sup>

"Decisively" repudiating the "primitive" interpretation of comment *j* that would accord warnings the power to override a manufacturer's design responsibilities,<sup>86</sup> the Third Restatement declares in no uncertain terms that the law does not permit a manufacturer to hide behind a warning in an attempt to insulate itself from its independent duty of safe design:

In general, when a safer design can reasonably be implemented and risks can reasonably be designed out of a product, adoption of the safer design is required over a warning that leaves a significant residuum of such risks. . . . Warnings are not . . . a substitute for the provision of a reasonably safe design.<sup>87</sup>

The courts have quite colorfully expressed the same idea. For example, the Michigan Supreme Court has observed that "[a] warning in not a Band Aid to cover a gaping wound, and a product is not safe simply

injury is best placed on the designer or manufacturer rather than on the individual user of a product."); *Glittenberg v. Doughboy Recreational Indus.*, 491 N.W.2d 208, 216 (Mich. 1992) ("A warning is not a Band-Aid to cover a gaping wound, and a product is not safe simply because it carries a warning."); *Robinson v. G.G.C., Inc.* 808 P.2d 522, 525 (Nev. 1991) ("[A] warning is not an adequate replacement when a safety device will eliminate the need for the warning."); *Lewis v. Am. Cyanamid Co.*, 715 A.2d 967, 977 (N.J. 1998); *Evridge v. Am. Honda Motor Co.*, 685 S.W.2d 632, 636 (Tenn. 1985) (interpreting comment *j* to allow simultaneous warnings and design claims). For early recognition that a manufacturer has a duty of safe design independent of any warnings, *See, e.g., James, Products Liability (pt. 1)*, 34 TEX. L. REV. 44, 49, 58-59 (1955).

85. To the extent that comment *j* retains any beneficial vitality in the modern world, it is as a source of consumer protection on an entirely separate issue. Indeed, most courts addressing the last paragraph of comment *j* have applied it in a consumer-friendly way, ruling in cases where adequate warnings are *not* provided that comment *j* supports a presumption favoring consumers—that, had the manufacturer provided an adequate warning, the plaintiff (or someone acting on his or her behalf) would have read and heeded it. This widely adopted "heeding presumption" is used to satisfy the consumer's burden of proof on cause in fact. *See, e.g., Coffman v. Keene Corp.*, 628 A.2d 710, 719 (N.J. 1993). After *Coffman*, a manufacturer that had warned of a danger asked the New Jersey court to apply comment *j* in *its* favor to bar the plaintiff's design defect claim. The court would not allow this nonsense: "Allowing such a warning to defeat a design-defect claim . . . would frustrate the imposition of liability when a product's design fails to take into account an injured party's objectively foreseeable misuse of the product." *Lewis*, 715 A.2d at 977. On this use of the heeding presumption, see 1 MADDEN & OWEN ON PRODUCTS LIABILITY, *supra* note 7, § 12:6. On the heeding presumption, see DAVID G. OWEN, PRODUCTS LIABILITY LAW § 11.4 (Thompson/West 2005).

86. The Restatement Reporters frequently have castigated this interpretation of comment *j*. For example, after the completion of the Third Restatement, the Reporters commented on their treatment of this aspect of comment *j*: "The Products Restatement rejects this primitive notion decisively." James A. Henderson & Aaron D. Twerski, *supra* note 3, at 689.

87. RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2 cmt. 1 (1998); *see also* Henderson & Twerski, *supra* note 3, at 689; Aaron D. Twerski, *In Defense of the Products Liability Restatement: Part I*, 8 KAN. J.L. & PUB. POL'Y 27, 29 (1998) ("[C]omment *j* took the position that a product whose dangers are warned against, is not defective. We took the position in section 2 comment *l* of the Restatement (Third) of Torts that one cannot warn one's way out of a defective design case. If there is a reasonable design which would make the product safer, the mere fact that one warned against it does not insulate the seller from liability. . . . We vehemently disagree with the Second Restatement.").

because it contains a warning.”<sup>88</sup> And the United States Court of Appeals for the District of Columbia Circuit has concluded that: “It is thus not correct that a manufacturer may . . . merely slap a warning onto its dangerous product, and absolve itself of any obligation to do more.”<sup>89</sup> More succinctly, warnings do not trump design.

### III. OVERLAP OF SAFETY OBLIGATIONS

#### A. THE PROPER ROLE OF WARNINGS IN DESIGN DEFECT DETERMINATIONS

While the three forms of defect generate independent safety obligations, such that the satisfaction of one obligation does not *ipso facto* satisfy the others, fulfilling one duty sometimes *helps* to satisfy another. This overlap of safety responsibilities is clearest in the area of design and warnings. The safer a manufacturer *designs* its products, the fewer dangers there will be about which to *warn*. As seen above, however, the issue usually is posed the other way: how may a *warning* affect a manufacturer’s duty of safe design? Although warnings will only rarely satisfy a manufacturer’s duty of safe design, as previously discussed, warnings sometimes are the only practical way to reduce a risk, particularly in the case of pharmaceutical drugs and other chemical and inherently toxic products.<sup>90</sup>

For example, a furniture polish that is very harmful if swallowed by young children would clearly be defective if sold without adequate warnings of the danger.<sup>91</sup> Assuming there is no way to change the chemical formulation of the polish to reduce the risk without sacrificing its effectiveness, a manufacturer who warns of such an unavoidable hazard might also be seen as having thereby satisfied any design obligations as well. In truth, however, such a manufacturer has no relevant duty of safe design because there is no duty to do the impossible, to design away an unavoidable risk.<sup>92</sup> So such cases are properly viewed as involving purely a duty to warn and not a duty to design away a danger inherent in the product.

Because warnings and instructions may in fact serve to reduce design hazards, at least to some extent, the provision of such information may have *some* bearing on design defectiveness.<sup>93</sup> Just as the obviousness of a hazard reduces the likelihood of resulting harm, so, too, do warnings and instructions.<sup>94</sup> Thus, because warnings reduce the risk of injury from

88. *Glittenberg v. Doughboy Recreational Indus.*, 491 N.W.2d 208, 216 (Mich. 1992).

89. *Rogers*, 144 F.3d at 844.

90. This is particularly so in the case of many generic product risks, as discussed in comment j. See I MADDEN & OWEN ON PRODUCTS LIABILITY, *supra* note 7, §§ 10:1, 10:9.

91. See, e.g., *Spruill v. Boyle-Midway, Inc.*, 308 F.2d 79, 81–86 (4th Cir. 1962).

92. I MADDEN & OWEN ON PRODUCTS LIABILITY, *supra* note 7, § 10:4.

93. *Id.* § 9:1.

94. See OWEN, *supra* note 85, § 9.1.

design hazards, the presence of a warning is one factor—sometimes an important one—to be balanced in the calculus of considerations involved in a determination of design defectiveness. Stated otherwise, in balancing the risk factors relevant to design defectiveness, a trier of fact should consider among other factors whether the design hazard was obvious, warned about, or generally known.<sup>95</sup>

## B. COMPATIBILITY OF SEPARATE DEFECT CLAIMS

While the three types of defect are conceptually distinct, separate claims for each often are compatible. Thus, in an appropriate case, the plaintiff may claim and attempt to prove that a product was defective according to two, or, albeit infrequently, all three different types of defect.<sup>96</sup> Stated otherwise, the different types of defect claims are not intrinsically exclusive.<sup>97</sup> Indeed, design and warning defect claims with respect to the same danger are quite commonly asserted and allowed in cases in which a manufacturer allegedly failed to warn of a significant hidden danger that reasonably could have been designed away.<sup>98</sup> For example, an SUV that rolls over too easily on particular steering maneuvers may be defective in design because its center of gravity is too high and its track width too narrow, and it may also be defective because of the absence of a warning of this tendency.<sup>99</sup> And while manufacturing defect claims usually stand on their own, they may be combined with design and even warnings claims on appropriate facts. So, if an occasional flashcube may explode when defectively manufactured, the seller may have a duty to warn of this tendency.<sup>100</sup> Sometimes the

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95. I MADDEN & OWEN ON PRODUCTS LIABILITY, *supra* note 7, § 10:2. The Third Restatement makes this point in describing the “broad range of factors” that may be relevant to the defectiveness of a product’s design, including “the magnitude and probability of the foreseeable risks of harm, the instructions and warnings accompanying the product, and the nature and strength of consumer expectations regarding the product.” RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2 cmt. f (1998).

96. See, e.g., *Anderson v. Owen-Corning Fiberglas Corp.*, 810 P.2d 549, 553 n.7 (Cal. 1991) (“In most instances, as here, the plaintiff alleges both design and warning defects.”). However, the facts of a particular case often preclude the assertion of particular defect claims. See, e.g., *Dierks v. Mitsubishi Motors Corp.*, 256 Cal. Rptr. 230, 231 (Cal. Ct. App. 1989) (where plaintiff tried auto roll-over case as a design case, claiming that the roof collapsed too easily, trial court properly refused to instruct jury on manufacturing defect claim: “A defect in manufacture is, of course, quite different from a defect in design.”).

97. See, e.g., *Caterpillar Tractor Co. v. Beck*, 593 P.2d 871, 878 n.15 (Alaska 1979) (“Manufacturing defects and design errors are not mutually exclusive.”); see also *Colt Indus. Operation Corp. v. Frank W. Murphy Mfg., Inc.*, 822 P.2d 925, 930 (Alaska 1991).

98. See *Anderson*, 810 P.2d at 553 n.7 (“In most instances, as here, the plaintiff alleges both design and warning defects.”); *Evridge v. Am. Honda Motor Co.*, 685 S.W.2d 632, 636 (Tenn. 1985) (allowing simultaneous warnings and design claims).

99. See, e.g., *Bericochea-Cartagena v. Suzuki Motor Co.*, 7 F. Supp. 2d 109, 110 (D. Puerto Rico 1998) (Suzuki Sidekick); *Purvis v. Am. Motors Corp.*, 538 So. 2d 1015, 1018–19 (La. Ct. App. 1988) (Jeep CJ-5).

100. See *Maybank v. S.S. Kresge*, 266 S.E.2d 409, 412 (N.C. Ct. App. 1980), *modified on other grounds and aff’d*, 273 S.E.2d 681 (N.C. 1981).

evidence is quite unclear as to whether a product was defective in manufacture or design,<sup>101</sup> and a plaintiff with credible evidence should be allowed to try to make out a case on both.<sup>102</sup> For example, a product's wires or cables may be mistakenly crossed during manufacture because the engineers did not design a sufficient separation to minimize this production risk. And if the engineers should have foreseen this hazard, perhaps they should have warned about the resulting danger. Malfunction cases present another example of how defect theories fairly may overlap. While the circumstances of a product malfunction ordinarily may suggest a manufacturing defect, sometimes a design defect may just as likely be the culprit.<sup>103</sup>

### CONCLUSION

From the time section 402A first hit the streets in 1965, the puzzle of comment *j* has interfered with an understanding of how the three defect types relate to one another. Comment *j* can be read broadly to insulate manufacturers from their duty of safe design if they warn of dangers in their products. But this is wrong. Comment *j* in fact applies only to the narrow class of inherently dangerous products—notably, food, alcoholic beverages, tobacco, and pharmaceutical drugs—whose hazards are unavoidable and, hence, cannot be designed away. Comment *j* simply does not address other types of products, and manufacturers of such other, “normal” products are fully subject to the separate duties of safe design, safe manufacture, and safe marketing. Conceptually distinct, the three different types of defect generate obligations that are largely independent of one another, that do not trespass one upon the other. This means that manufacturers of products with substantial hazards must take all reasonable steps to design those hazards away, and that providing warnings of such hazards will not suffice. Warnings do not trump the duty of safe design. Rather, it is the other way around.

Interpreting comment *j* to make the duty of safe design contingent on a manufacturer's failure to warn is contrary to the original purposes of section 402A; contrary to a fair reading of comment *j* in context with the

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101. See, e.g., *Stazenski v. Tennant Co.*, 617 So. 2d 344, 346 (Fla. Dist. Ct. App. 1993) (worker cut on sharp edge of industrial sweeper).

102. See, e.g., *Richcreek v. Gen. Motors Corp.*, 908 S.W.2d 772, 777 (Mo. Ct. App. 1995), in which a car's seat hinge pin, which may have been too short and may have needed welding rather than pounding into place, may have been pounded into place improperly: “In the case at bar, there appears a very fine line between design and manufacturing defects under strict liability. To limit a plaintiff to one theory where no inconsistency exists with others is too restrictive.”

103. See, e.g., *Smith v. Ford Motor Co.*, 215 F.3d 713, 716 (7th Cir. 2000) (reversing dismissal of plaintiff's claim, although plaintiff's expert, who concluded that steering failed due to defect in a van's steering gearbox, was unable to determine whether defect was due to design or manufacture); *Morden v. Cont'l AG*, 611 N.W.2d 659, 664 (Wis. 2000) (upholding verdict for plaintiff finding that tire manufacturer was negligent in design or manufacture of tires). On the malfunction doctrine, see 1 MADDEN & OWEN ON PRODUCTS LIABILITY, *supra* note 7, § 7:12.

other comments; contrary to the understanding of section 402A's author, Dean Prosser, and of his Advisers on the Restatement project; contrary to sound policy; and contrary to the developed jurisprudence on products liability law over nearly forty years. Now that this quizzical little puzzle has been solved, courts and commentators can return to the basic work of applying the defect concepts properly without the distraction of an apparent distortion at the center of products liability law.